trial judge must have taken into account when assessing the credibility of Doshi's evidence. I am not satisfied that these matters, though relevant for consideration, taken individually or collectively raised the inescapable inference that Doshi was not a truthful witness as regards what was said over the telephone on the 13th May 1959 and much less am I satisfied on all the evidence that these matters indicated that Whang was the truthful witness in respect of this particular telephone conversation.

In the face of the deliberate refusal of the trial judge to accept Whang's evidence on this telephone conversation as truthful, the considerations put forward by counsel for the appellants are not sufficient in my opinion to enable an appellate tribunal, on principles which have been so clearly laid down by the highest authorities, to reinstate Whang as a reliable witness and in the result this appeal must fail.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Solicitors: *Drew & Napier*; *Mallal & Namazie.*

Appeal dismissed.

GOLDEN HOPE RUBBER ESTATE LTD. v. KUPPUSAMY

[O.C.J. (Ong J.) April 9, 1964]

[K.L. — Civil Appeal No. 9 of 1963]

Workmen's Compensation—Weeding labourer returning home to collect proper tools—Accident at house resulting in death—Whether accident arose out of and in the course of employment—Workmen's Compensation Ordinance, 1952, ss. 4 & 39(2).

A female labourer attended dawn muster on the appellants' estate and following this went to her house to pick up the proper tools for the work she was going to do on that particular day. Whilst at her house she had a fall from which she died. There was abundance of uncontradicted evidence that the standing rule in the appellant estate was that all labourers should proceed direct after muster to their place of work and anyone found in breach of the this rule would not be given work for that day.

The respondent, the deceased's husband, claimed compensation under the Workmen's Compensation Ordinance and the employers, the defendants, denied liability. In these circumstances the Commissioner for Labour held an inquiry and made a finding for the respondent which finding was later adopted by an arbitrator acting under section 30 of the Ordinance. On appeal by reason of a certificate under section 39(2) the following questions had to be decided (a) whether the deceased's daily employment commenced from her attendance at muster and (b) if not whether in going to her place of work she should be deemed to have been acting in the course of employment.

Held: (1) the daily employment of labourers on the appellant estate commenced from the time the labourer reported at the place of work and not from the time he attended at the dawn muster. The accident to the deceased did not therefore occur at a time when her daily employment had commenced and could not therefore be said to have "arisen out of and in the course of employment";

(2) as the deceased had not commenced her daily employment at the time of the accident she could not be deemed to have been acting in the course of her employment at the time of her accident under section 4(1)(b) or section 4(1)(d).

Cases referred to:—

(1) *M'Garvey* v. *Caledonis Stevedoring Co. Ltd.* [1943] 1 All E.R. p. 611.

(2) *Ilkiw* v. *Samuels* [1963] 1 W.L.R. 991, 998.

The following cases were also cited in argument: *Jones* v. *Tarr*, [1926] 1 K.B. 25, 30; *Cross, Tetley & Co. Ltd.* v. *Catterall*, [1926] 1 K.B. 488; *Parker* v. *Owners of Ship "Black Roadk"* [1915] A.C. 725, 730; *Walters* v. *Stavely Coal & Iron etc.*, 105 L.T.R. p. 119; *Williams* v. *Sir C. G. Asshoton Smith*, 108 L.T.R. p. 200; *M'Garvey* v. *Caledonis Stevedoring Co. Ltd.* [1943] 1 All E.R. 611; *R.* v. *National Insurance (Industrial Insurance) Commissioner, Ex parte Richardson*, [1958] 2 All E.R. 689; *Upton* v. *Great Central Railway Co.* [1924] A.C. 302; *Lander* v. *British United Shoe Machinery Co. Ltd.*, 149 L.T.R. p. 395, 398; *Thomas* v. *Pentremawr Colliery Co. Ltd.*, 19 B.W.C.C. 331 (1926), 336; *Noble* v. *Southern Railway Co.*, 33 B.W.C.C. 176 (p. 181); *St. Helen's Colliery* v. *Hewitson*, [1924] A.C. 59.

The following authorities were also cited: Workmen's Compensation Regulations, 1953, Regns. 23, 25, 29; 34 *Halsbury* (2nd Ed.) p. 823; *Willis* (37th Ed.) on Workmen's Compensation p. 97 (Rules I. & II) 98, 99.

CIVIL APPEAL.

M. Shankar for the appellant.

P. G. Lim (Miss) for the respondent.

Cur. Adv. Vult.

Ong J.: This is an appeal from the decision of the President of the Sessions Court given by him as arbitrator, under section 30 of the Workmen's Compensation Ordinance, 1952. This appeal lies by reason of a certificate given by Gill J. under section 39(2).

Briefly, the question of law for determination is whether a female weeding labourer, who should have proceeded direct to her place of work after dawn muster, but had gone home instead to collect the proper weeding implements and there had a fall which resulted in her death, suffered an accident arising out of and in the course of her employment.

It was contended on behalf of the deceased's husband, who is the respondent in this appeal, that, even if it was contrary to standing orders of the employer for the deceased to have gone home after muster, nevertheless, by reason of the provisions of section 4(1)(d), the accident should be deemed to have arisen out of and in the course of her employment, because her going there was "for the purposes of and in connection with the employer's trade or business."

On the other hand counsel for the appellant argued that the decision was wrong in law because the accident, which occurred in the deceased's own private place of abode and which did not arise out of any risk incidental to her employment, cannot be deemed to have been an

accident arising out of and in the course of employment.

For the purposes of this appeal I accept the finding of fact set out in the so-called "Comments" of the Junior Assistant Commissioner for Labour (with which the arbitrator agreed) that the deceased had attended muster armed with a "changkol", instead of the "tajak" she required and that she went back to her house in order to equip herself properly for the work she had to do. Having thus disposed of this controversial aspect of the case, the following questions remain: (a) whether the deceased's daily employment commenced from her attendance at muster; (b) if not, whether in going to her place of work she should be deemed to have been acting in the course of her employment.

As in the majority of cases under the Workmen's Compensation Ordinance, the main difficulty here lies in applying well-known principles of law to the unusual circumstances of this particular accident.

The result has been that, on both sides of the line, a number of cases were cited by counsel in support of their arguments. With all respect, however, I think each case is hardly more than a decision on its particular facts and I trust I shall not be considered guilty of discourtesy to counsel if I spare myself the labour of referring to the various authorities cited and distinguishing them from the widely differing facts in the instant case. I propose, instead, to apply the relevant provisions of law, as set out in section 4 of our Ordinance, to the plain and undisputed facts herein.

Paragraph (a) of sub-section (1) enunciates, in general terms, the employer's liability to his workmen for personal injury by accident arising out of and in the course of employment. Paragraphs (b), (c) and (d) then provide that, under certain specified circumstances, an accident which cannot properly be said to have arisen out of and in the course of employment shall be deemed to be of that character. Briefly, these occasions arise (i) where an accident happens while the workmen is travelling to and from his place of work; (ii) where the accident happens in or about the premises at which the workman is employed to work, while he is taking emergency measures to protect life or property; and (iii) where the accident happens in the course of employment but the workman was injured while acting contrary to orders or instructions. I omit as irrelevant sub-sections (2), (3) and (4) which absolve the employer from liability. Finally, sub-section (5) raises the presumption that an accident arising in the course of a workman's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment.

As to the first question: whether the deceased's employment commenced from her attendance at muster, there is no finding on this point by the arbitrator who left the matter at large. There is, however, an abundance of uncontradicted evidence that the standing rule in the appellant's estate was that all labourers should proceed direct after muster to the place of work, and that anyone found to have been in breach of this rule would not be given work for the day. No permission by anyone in charge was shown to have been granted to the deceased to return home, which otherwise might have afforded some justification or excuse for her deviation from the direct course between the place of muster and the place of work. It is clear, therefore, that while muster provided a convenient occasion for the daily roll-call, it was the labourer's actual and punctual presence at the place of work which entitled him or her to claim wages for the day. It is also clear that no sanctions were imposed by the employer on any labourer who chose to be missing from work after muster, beyond loss of the day's wages. The absence of any obligation to proceed from muster to the place of work of course means the corresponding absence of any right of control by the employer over the labourer after the muster and roll-call. It follows, therefore, that the employment of any labourer for the day did not commence until he or she appeared at the place of work. The answer to the first question therefore must be in the negative. See *M'Garvey* v. *Caledonia Stevedoring Co. Ltd.*[1]

This conclusion is in no way affected by the provisions of section 59(5) of the Employment Ordinance, 1955, to which my attention has been drawn by counsel for the respondent. The sub-section was enacted only for the express purpose of computing hours of work, and nothing turns on it for the different purpose of determining whether a master-and-servant relationship arises thereon.

I come then to the second question: whether, in going to the place of work, the deceased should be deemed to have been acting in the course of her employment. It seems to me that, unless muster necessarily coincided with the start of employment for the day — which is not the case here — any accidental injury sustained by a labourer while on his way to work must come within the four corners of paragraph (b) of section 4(1) if it is to be "deemed to arise out of and in the course of employment."

The paragraph reads thus:

"(b) An accident happening to a workman while he is, with the express or implied permission of his employer, travelling as a passenger by any vehicle, ship, vessel, or aircraft to or from his place of work shall, notwithstanding that he is under no obligation to his employer to travel by such means, be deemed to arise

out of and in the course of his employment, if the accident would have been deemed so to have arisen had he been under such an obligation, and if at the time of the accident, the vehicle, ship, vessel or aircraft is being operated by or on behalf of his employer or by some other person by whom it is operated in pursuance of arrangements made with his employer and is not being operated in the ordinary course of a public transport service."

There can be no suggestion that it applies in the present case.

It had been held, however, by the arbitrator, adopting the view of the Assistant Commissioner for Labour, that by reason of paragraph (d) of section 4(1), the breach of the standing order by the deceased did not take the accident outside the course of her employment because her going home was an act done for the purposes of and in connection with the employer's trade or business.

The paragraph reads:

"(d) An accident happening to a workman shall be deemed to arise out of and in the course of his employment notwithstanding that he was at the time of the accident acting in contravention of any statutory or other regulations applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if —

(i) the accident would have been deemed so to have arisen had such act not been done in contravention as aforesaid or without instructions from his employer, as the case may be; and

(ii) such act was done for the purposes of and in connection with the employer's trade or business."

The Assistant Commissioner for Labour had stated his view of the law as follows:

"The question as to whether Sanjayee did disobey the standing order of the estate in returning to her quarters after muster on 2.10.61 is not to my mind the crux of the whole matter. Even if it were granted that Sanjayee was at the time of the accident acting in contravention of a standing order applicable to her employment, the operation of section 4(1)(d)(i) would nevertheless bring her back within the scope of her employment.

The next question to consider was whether the act of returning home after muster on 2.10.61, although in contravention of a standing order of the estate, was done for the purposes of and in connection with the employer's trade or business. It is a reasonable presumption that Sanjayee returned home after muster on 2.10.61 to change her changkol to a tajak with a view to working in the 'Temple Area' for the employer."

In coming to that conclusion the Assistant Commissioner for Labour had been guilty of a fatal omission: failing to bear in mind that, for the accident to have happened in the course of employment, the deceased's employment for the day must have commenced before the fatal injury. His reasoning, in a few words, is this: the deceased's object in going home was with a view to serving her employer; consequently, even if she acted contrary to standing orders by so doing, the effect of section 4(1)(d)(i) was nevertheless to bring her back within the scope of her employment. The fallacy in his logic is that it proceeds on the false hypothesis that the deceased was acting in the course of her employment while going home. It is nothing of the sort. As Millmer L.J. said recently in *Ilkiw* v. *Samuels*: [2]

"....the mere fact that the act complained of was done in disobedience to express instructions is of no necessary materiality in deciding whether or not the act was within the course of employment."

There are two limbs to paragraph (d). But the first is plainly missing. As I have already stated earlier in this judgment, the master-and-servant relationship did not arise unless and until the deceased appeared at the place of work. Hence she had not yet been employed for the day when she departed for home. Before such employment she manifestly could not have been acting in the course thereof.

The appeal must therefore be allowed and the order of the arbitrator set aside, with costs.

Before leaving this case I ought to mention that the procedure followed in this case was entirely wrong and contrary to the provisions of the Workmen's Compensation Ordinance and the Regulations thereunder. The function of the Commissioner for Labour, under section 27 of the Ordinance, is only to hold an inquiry for the purposes of settling disputed questions between workmen and employer by agreement. Where such questions cannot be settled by agreement they have to be referred to the arbitrator for his award or decision (see section 30). In this case agreement was manifestly out of the question from almost the very beginning of the proceedings, when the employer denied that the accident arose in the course of the deceased's employment. In default of agreement the Assistant Commissioner for Labour, as an administrative officer, had no jurisdiction whatsoever in proceeding any step further to undertake the judicial functions of holding an inquiry and deciding on the merits of the claim. These functions properly belong to the arbitrator. The Assistant Commissioner was thus acting *ultra vires* in making his so called "comments" which in effect were his grounds of judgment. I trust that hereafter practice will conform to Regulations 38 to 44 of the Workmen's Compensation Regulations 1953, instead of treating them as a dead letter.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.*; *P. G. Lim.*